No. 79-2006

In the

Supreme Court of the United States

OCTOBER TERM, 1980

LLOYD BARRENTINE, et al.,

Petitioners,

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC. et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS TO FILE A BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the petitioners in this case.

INTEREST OF THE AFL-CIO

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States. This case concerns the scope and function of grievance arbitration systems established through collective bargaining. Thus, the question presented is at the core of the

labor movement's concerns. It is for that reason that the AFL-CIO seeks this opportunity to present its views to the Court.

ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The petition for certiorari and brief of the United States in support thereof rest their argument for reversal largely on this court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, which held that an individual's claim under Title VII of the Civil Rights Act of 1964 is not barred by his failure to exhaust the procedures provided under contractual grievance procedures, or even by an adverse award thereunder. Petitioners and the United States point out substantial parallels between the statutory scheme under Title VII and under the Fair Labor Standards Act which, they urge, require the same result in this case. And, much of what we will say below is, indeed, anticipated by this Court's unanimous opinion in that case.

We submit the attached brief, however, because we believe that it is essential to do business not only with *Alexander* but also with this Court's decision in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, which approved deferral by the NLRB to the awards of arbitral tribunals, and because we also believe that a sounder approach to the problem exemplified by *Carey, Alexander* and the present case is one based on general principle, rather than on *ad hoc* evaluation of the particular statute on which the individual's claim is based.

We believe that such a general approach not only avoids unnecessary litigation, but furthers both the objectives of Congress in enacting such protective legislation and in encouraging the private resolution of contractual disputes.

The court below certainly thought that it was furthering the arbitral process by its decision. Thus the last of these points may appear paradoxical. But we submit, for the reasons we state that the contractual grievance process is overburdened and jeopardized by imposing on it functions extrinsic to its nature and purpose.

In a word, our basic thesis is that these procedures are designed to resolve disputes over rights which have their *source* in collective bargaining agreements, and are not charged with vindicating and do not provide a substitute for the rights which Congress has by statute granted to individual employees. That thesis is qualified, as we shall develop, by the caveat that some federal legislation while protective of the rights of individual employees is subject to the fundamental policy of free collective bargaining and to that extent permits or indeed encourages an accommodation of such individual statutory rights to the fruits of the collective bargaining process of which the entire grievance machinery is an important component. We submit that our thesis with the stated limitations not only resolves any tension between *Alexander* and *Carey,* but, more importantly, effectuates the national labor policy as an entirety.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

Respectfully submitted
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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the AFL-CIO in this case is set forth in that motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The holding of the Court below—that petitioners' claims for minimum wages under the Fair Labor Standards Act are barred by an adverse determination by the tribunal established under the collective bargaining agreement for deciding grievance disputes arising under that agreement—

rests on the importance that national labor policy places on the voluntary adjustment by the parties of contractual disputes. We agree that this Court's decisions properly leave no room for doubt that this is indeed an important element of the national labor policy, which the courts, in exercising their responsibilities under the Labor-Management Relations Act, are required to respect and implement. We are nevertheless constrained to disagree with the decision of the Court of Appeals and to urge its reversal.

The petition for certiorari, and the brief of the United States in support thereof rest their argument for reversal largely on this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, which held that an individual's claim under Title VII of the Civil Rights Act of 1964 is not barred by his failure to exhaust the procedures provided under contractual grievance procedures, or even by an adverse award thereunder. Petitioners and the United States point out substantial parallels between the statutory scheme under Title VII and under the FLSA which, they urge, require the same result in this case. And, much of what we will say below is, indeed, anticipated by this Court's unanimous opinion in that case.

We submit this brief, however, because we believe that it is essential to do business not only with *Alexander* but also with this Court's decision in *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, which approved deferral by the NLRB to the awards of arbitral tribunals, and because we also believe that a sounder approach to the problem exemplified by *Carey, Alexander* and the present case is one based on general principle, rather than on *ad hoc* evaluation of the particular statute on which the individual's claim is based.

We believe that such a general approach not only avoids

unnecessary litigation, but furthers both the objectives of Congress in enacting such protective legislation and in encouraging the private resolution of contractual disputes. The court below certainly thought that it was furthering the arbitral process by its decision. Thus the last of these points may appear paradoxical. But we submit, for reasons to be stated, that the contractual grievance process is overburdened and jeopardized by imposing on it functions extrinsic to its nature and purpose.

In a word, our basic thesis is that these procedures are designed to resolve disputes over rights which have their *source* in collective bargaining agreements, and are not charged with vindicating and do not provide a substitute for the rights which Congress has by statute granted to individual employees. That thesis is qualified, as we shall develop, by the caveat that some federal legislation while protective of the rights of individual employees is subject to the fundamental policy of free collective bargaining and to that extent permits or indeed encourages an accommodation of such individual statutory rights to the fruits of the collective bargaining process of which the entire grievance machinery is an important component. We submit that our thesis with the stated limitations not only resolves any tension between *Alexander* and *Carey,* but, more importantly, effectuates the national labor policy as an entirety.

In part I of our argument we trace the distinction between the two basic components of the national labor policy —on the one hand the rights of self-organization and of free collective bargaining stated in the NLRA and the LMRA, and, on the other the various minimum substantive rights protecting employees created in such legislation as

FLSA. We stress that employee rights achieved through the collective action provided for by the NLRA are the product of a system of majority rule and are subordinate to those of the majority. We note also the limitation on that proposition—that such contractually created individual rights are enforceable, and that enforcement through arbitration is favored.

Part II constitutes our effort to apply the basic principles just noted to the problem presented by the instant case. Our first major point is that the source of statutory rights is a decision by Congress as matter of public policy rather than the exercise of economic strength, which is the source of the rights under collective bargaining agreements. Thus, unless Congress has chosen to allow it, these public rights are not to be subordinated to private agreements. And it necessarily follows that statutory rights are to be vindicated according to the methods prescribed by Congress, and not according to the methods prescribed by private parties. Our second major point is that contractual grievance procedures are designed to resolve disputes concerning rights *created* by the contract; the reasons public policy favors this system, the considerations that cause the parties to choose it, and its functional strengths, have nothing to do with the enforcement of statutory rights.

Finally, in part III we turn to the question of why deference is paid to arbitrations concerning NLRA-created rights. We show that while the employee rights created by the FLSA, Title VII and kindred statutes are usually ends in themselves and are therefore not waivable, certain NLRA rights are viewed as means to the end of industrial self-government and therefore may be subordinated to the collective bargaining system as a whole, including the arbitration machinery.

ARGUMENT

I. The Basic NLRA Principles

1. The AFL-CIO firmly believes that the greatest and most fundamental protection of the economic standard of workers in general is the right of free collective bargaining through their chosen representative. For it is that right alone which addresses the very essence of the workers' economic condition *vis-a-vis* their employer. What Chief Justice Taft wrote in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U.S. 184, 209 remains as true now as it was then:

> [Labor organizations] * * * were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They united to exert influence upon him and to leave him in a body in order by this inconvenience to induce him to make better terms with them. * * * The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital.

Statutory protection of the employees' right "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection," was provided by the National Labor Relations Act of 1935 ("NLRA"), and particularly § 7 thereof. In

sustaining the constitutionality of the NLRA, Mr. Chief Justice Hughes declared that right to be "fundamental" and recalled what his predecessor had written a generation earlier concerning the reason for labor organizations. *Labor Board* v. *Jones & Laughlin Corp.*, 301 U.S. 1, 33. For, the same understanding of the role and necessity of free collective bargaining was embodied in the Congressional "findings and policies" declared in § 1 of that Act.

As Mr. Justice Black wrote in *Porter Co.* v. *NLRB*, 397 U.S. 99, 103:

> The object of this Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions. The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement. But it was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.

Although the Labor Management Relations Act of 1947 ("LMRA") amended the NLRA (including §§ 1 & 7) in some respects, the protection of the right of employees to bargain collectively through representatives of their own choosing has remained at the heart of the national labor policy. Indeed, Senator Robert A. Taft, the chief sponsor of the 1947 amendments, which were, on the whole, adverse to organized labor, stressed the importance of free collective bargaining (including the right to strike over terms

and conditions of employment) as essential for the maintenance of a free economy.[1] And the 1947 Amendments added § 8(d) of the Act in order to make it "clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *Labor Board* v. *American Nat. Ins. Co.*, 343 U.S. 395, 404. See also *Labor Board* v. *Insurance Agents*, 361 U.S. 477, 487; *Porter Co.*, *supra*, 397 U.S. at 105-106.

2. However, the national labor policy has not left the protection of workers exclusively to what they can achieve through collective bargaining. The Fair Labor Standards Act of 1938, under which the present case arises, and various veterans' preference laws are among the growing number of statutes which have established norms binding on all employers (and in some instances on labor organizations as well) with respect to terms and conditions of employment (including the decision regarding the selection of employees). As one commentator has observed:

> [W]ithin a few years [after 1960] there began an ever increasing quantity of substantive federal regulation of the terms and conditions of employment * * *. In 1963, there was the Equal Pay Act; in 1964, Title VII of the Cviil Rights Act; in 1970, the Occupational Safety and Health Act and Title III of the Consumer Credit Protection Act limiting the right of an employer to discharge because of garnishment. In 1974, the Employee Retirement Income Security Act (ERISA) was passed ***.[2]

[1] See 93 Cong. Rec. 3835-3836 quoted as authoritative in *Bus Employees* v. *Wisconsin Board*, 340 U.S. 383, 395, n. 21.

[2] Feller, *Arbitration: The Days of Its Glory Are Numbered*, 2 Industrial Relat. L.J. 97, 105 (1977) (footnotes omitted). This article will hereafter be cited as "Feller, *Arbitration.*"

To this list could be added, *inter alia*, the Age Discrimination Act of 1967, Title IX of the Education Amendments of 1972, and the various mine safety and health protection acts. Each of these statutes substantially affect the terms of collective agreements on mandatory subjects of bargaining by setting minimum standards of protection for individual employees which may not be breached.[3]

3. Individual workers thus obtain various protections and benefits from separate and distinct sources—private contract law and public law. Insofar as those rights are based on a collective bargaining agreement the rights of the individual are, as has been understood from the beginning, subordinated to those of the majority. As this Court reaffirmed in *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 62:

[3] The great bulk of employee protective legislation postdates the enactment of the NLRA, in part because the clarification in constitutional doctrine that began with the *Jones & Laughlin* decision have made them possible. Cf. Mr. Justice Black's observation in *Porter, supra*, 397 U.S. at 104-105: "The Act was passed at a time in our Nation's history when there was considerable legal debate over the constitutionality of any law that required employers to conform their business behavior to any governmentally imposed standards." Nonetheless, some employee protective legislation was already in effect when the NLRA was adopted. *E.g.* 46 U.S.C. § 596-597, which was derived from the Act of July 20, 1790, (see *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 353-354, discussed at p. 22, n.16, *infra*); Davis-Bacon Act, 40 U.S.C., § 276a *et seq.*, originally adopted March 3, 1931. Although the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C., § 101, *et seq.*, principally regulates the jurisdiction of the federal courts, it contains some substantive provisions, including § 3, which declares unenforceable as against public policy any agreement whereby a party agrees not to join, become or remain a member of any labor organization or employer, or that he will withdraw from an employment relationship in the event that he does so. (29 U.S.C. § 103).

> Central to the policy of fostering collective bargaining where the employees elect that course, is the principle of majority rule. See *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). If the majority of a unit chooses union representation, the NLRA permits it to bargain with its employer to make union membership a condition of employment, thereby imposing its choice upon the minority. 29 U.S.C. §§ 157, 158(a)(3). In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective strength and bargaining power, in full awareness that the superior strength of some individuals or groups might be subordinated to the interest of the majority.*** As a result, "[t]he complete satisfaction of all who are represented is hardly to be expected." *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).

In a footnote to this passage the Court observed:

> In introducing the bill that became the NLRA, Senator Wagner said of the provisions establishing majority rule: "Without them the phrase 'collective bargaining' is devoid of meaning, and the very few unfair employers are encouraged to divide their workers against themselves." 79 Cong. Rec. 2372 (1935). [420 U.S. at 62, n. 13]

One consequence is that the collective bargaining agreement extinguishes whatever rights the employee may have had under an individual contract with his employer. This result is logically inherent in the very concept of collective bargaining. The subject was most fully addressed in *J. I. Case Co.* v. *Labor Board*, 321 U.S. 332, 337-339:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking

to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement. * * * Wherever private contracts conflict with its functions, they obviously must yield or the Act would be reduced to a futility.

It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. * * *

[W]e find the mere possibility that [individual] agreements [containing] * * * better terms than those obtainable by the group * * * might be made no ground for holding generally that individual contracts may survive or surmount collective ones. The practice and philosophy of collective bargaining looks with suspicion on such individual advantages. * * * They are a fruitful way of interfering with organization and choice of representatives; increased compensation, if individually deserved, is often earned at the cost of breaking down some other standard thought to be for the welfare of the group, and always creates the suspicion of being paid at the long-range expense of the group as a whole. Such discriminations not infrequently amount to unfair labor practices. The workman is free, if he values his own bargaining position more than that of the group, to vote against representation; but the majority rules, and if it collectivizes the employment bargain, individual advantages or favors will

generally in practice go in as a contribution to the collective result.[4]

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[4] The loss of the right to enforce his individual employment contract will rarely, if ever, involve a genuine diminution in the employee's economic interest. For the economic reality which has led to worker organization and collective bargaining is that the individual employment contract is a "bargain" in only the loosest sense; the individual employee has no bargaining power whatsoever. See pp. 5-6 *supra*. As one observer wrote at the turn of the century:

> • • • The "individual bargain," or individual contract, between employers and men means that the condition of the worst and lowest man in the industry will be that which the best man must accept. From first to last, from beginning to end, always and everywhere, trade unionism stands unalterably opposed to the individual contract. There can be no concession or yielding upon this point. No monetary advantage, however great or however ardently desired, no advance in wages, no reduction in hours, no betterment in conditions, will permanently compensate workingmen for even a temporary surrender in any part of this fundamental principle. It is this principle, the absolute and complete prohibition of contracts between employers and individual men, upon which trade unionism is founded. There can be no permanent prosperity to the working classes, no real and lasting progress, no consecutive improvement in conditions, until the principle is firmly and fully established, that in industrial life, especially in enterprises on a large scale, the settlement of wages, hours of labor, and all conditions of work, must be made between employers and workingmen collectively and not between employers and workingmen individually. • • • [Mitchell, John, *Organized Labor*, Philadelphia (1903) pp. 3-4, reprinted at pp. 57-58 of the Brief of the National Labor Relations Board in *J. I. Case Co., supra*, No. 67, Oct. Term, 1943.]

See also the other "Statements of Economists and Experts in the Field of Labor Relations Respecting the Relationship of Individual Bargaining to Collective Bargaining" as set forth as Appendix B to that Brief, pp. 56-67.

4. Individual rights under a collective bargaining agreement, however, are enforceable. One of the major additions to the national labor policy effectuated by the 1947 amendments is § 301(a) of the LMRA which provides for the judicial enforcement of collective agreements.[5] *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448. And it is now established (after some earlier doubts [6]) that the rights of individuals under collective agreements may be judicially enforced by the individual himself, as well as by the bargaining agent. *Smith* v. *Evening News Assn.,* 371 U.S. 195; *Auto Workers* v. *Hoosier Cardinal Corp.,* 383 U.S. 696; *Hines* v. *Anchor Motor Freight,* 424 U.S. 554.

The enforcement of rights under collective agreements is the subject of an additional Congressional policy, which also became part of the law in 1947. Section 203(d) of the LMRA provides in pertinent part:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Congress thereby gave specific approval to the means which unions and employers had developed for private resolution of disputes concerning rights created by collective bargaining agreements.[7]

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[5] For completeness we note that § 301(a) extends to the enforcement of labor "contracts" and not only to collective bargaining agreements (*Retail Clerks* v. *Lion Dry Goods,* 369 U.S. 17).

[6] See the various opinions in *Westinghouse Employees* v. *Westinghouse Corp.,* 348 U.S. 437, and the reservation in *Lincoln Mills,* 353 U.S. at 459, n. 9.

[7] The legislative history set forth in *Lincoln Mills,* 353 U.S. at

The decisions of this Court have given broad and hospitable scope to this major component of the national labor policy. *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (hereafter "*Warrior & Gulf*"), while recognizing that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit * * *," held that:

> "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." [*Id.* at 582-3.] [8]

And in a companion case in the familiar *Steelworkers* trilogy, *Steelworkers* v. *Enterprise Mfg. Co.*, 363 U.S. 593, the Court determined that the scope of judicial review of arbitration awards is very narrow. "The federal policy of settling labor disputes by arbitration would be undermined if courts had the finay say on the merits of the awards" (*id.* at 596). See also *Drivers Local Unions* v. *Riss & Co.*, 372 U.S. 517, 519.

As summarized in *Hines* v. *Anchor Motor Freight, supra,* the "Congressional policy" embodied in § 203(d)

> "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960). Courts are not to usurp those functions which

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452-457, shows that the enforcement of promises to arbitrate was also one of the important considerations underlying the enactment of § 301(a). See 353 U.S. at 452-457. See also *Warrior & Gulf, supra,* 363 U.S. at 577-578.

[8] See also, *e.g.*, *Nolde Bros., Inc.* v. *Bakery Workers,* 430 U.S. 243, 254-255.

> collective-bargaining contracts have properly "entrusted to the arbitration tribunal." *Id.*, at 569. They should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise "plenary review by a court of the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 599 (1960). [424 U.S. at 562-563.]

An important corollary to this policy, which directly affects the judicial enforcement by individuals of contractual rights has been established by this Court: An individual must attempt to exhaust the contractual grievance procedure prior to bringing suit under contract (*Republic Steel Corporation* v. *Maddox*, 379 U.S. 650) and his suit is also subject to the finality provisions of the agreement (*Humphrey* v. *Moore*, 375 U.S. 335; *Hines, supra*, 424 U.S. at 562-563). In both situations, this bar is removed and the individual may prosecute his suit under the contract against the employer if he can establish that the grievance procedure did not operate properly because of a breach of the duty of fair representation by the union, *e.g. Vaca* v. *Sipes*, 386 U.S. 171, 185-187; *Hines, supra* 424 U.S. at 567-572.

II. The Principles Governing This Case

In the present case the court below treated the award of the Joint Grievance Committee as a final and binding determination not only of petitioners' rights under the contract, but also of their rights under the FLSA. That court was clearly right in the holding (which is not challenged here) that the Joint Grievance Committee award was bind-

ing against petitioners of their contractual claim.[9] But we submit that the lower court erred in holding that the award also barred petitioners' claims under the FLSA. The difference in result is required for two reasons: First, an individual's rights under a collective bargaining agreement are fundamentally different from those which he is granted by statute; second, the national labor policy which is embodied in §§ 203(d) & 301, and which the Court has effectuated in cases such as the *Steelworkers* trilogy, is to promote the private adjustment of disputes concerning *contractual,* and not statutory rights.

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[9] The Court of Appeals adverted to criticism of the procedures of the Joint Grievance Committee because it is composed solely of an equal number of union and member representatives and contains no neutral tiebreaker. 615 F.2d 1195, 1201. As that court recognized, such objections were answered by this Court in *Drivers Local Union* v. *Riss, supra.*

> It is not enough that the word "arbitration" does not appear in the collective bargaining agreement, for we have held that the policy of the Labor Act "can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564, 566, cf. *Retail Clerks etc.,* v. *Lion Dry Goods, Inc.,* 369 U.S. 17. Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the Agreement, it is enforceable under § 301. And if the Joint Area Cartage Committee's award is thus enforceable, it is of course not open to the courts to reweigh the merits of the grievance. *American Mfg. Co., supra,* at 567-568 [372 U.S. at 519]

To this we add one additional comment. For the courts to impose their own views as to what is a more desirable method for resolving contractual disputes (as by insisting on a neutral tiebreaker) although there is no reference thereto in § 203(d) or § 301 (and none

1. As we developed at pp. 5 to 7, and 8 to 14, *supra*, Congress has adopted a national labor policy which encourages the practice and procedure of collective bargaining in recognition of the fact that the individual worker has no bargaining power.

The definition of the duty to bargain, § 8(d),[10] as well as the specific policy embodied in § 203(d), allows no doubt that the enforcement of rights stated in collective agreements is to be governed by the same majoritarian principle under which those rights were created. Since the terms and conditions which the individual enjoys under such agreements are the product of the collective strength of the group, and are not imposed on him by the employer's overriding economic strength, as is an individual employment contract, this policy rarely, if ever, leaves the employee in a worse position than he would have been absent collective bargaining. With one exception, cases in which individuals seek to enforce rights under collective bargaining agreements contrary to the decision of the representative, or of the tribunal established by the agreement for the resolution of contractual disputes, are cases in which the individual wishes to enjoy the benefits of representation and

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is present at earlier stages of the ordinary grievance procedure) would be to defeat the policy also of § 8(d) (see pp. 6-7 *supra*) which the courts must respect in suits under § 301. *Howard Johnson Co.* v. *Hotel Employees*, 417 U.S. 249, 254-256; *Carbon Fuel* v. *Mine Workers*, 444 U.S. 212, 218-219.

[10] "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to * * * the negotiation of an agreement, or any question arising thereunder, * * *."

the collective strength of the group, but wishes to avoid the inherent cost of every political system—that on occasion the individual's interests are subordinated to those of the group. That exception is covered by the right to fair representation as declared in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192, and most recently explained in *Hines, supra*:

> Because "[t]he collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit," *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967), the controlling statutes have long been interpreted as imposing upon the bargaining agent a responsibility equal in scope to its authority, "the responsibility and duty of fair representation." *Humphrey* v. *Moore, supra*, at 342. The union as the statutory representative of the employees is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor* v. *Huffman, supra*, at 338. [424 U.S. at 554]

As that statement shows, the distinction between contractual and statutory rights is sound also when the problem is viewed in terms of the functions and duties of the individual's representative, the union. The union's statutory authority—and the derivative duty of fair representation in the exercise of that authority—grow out of the collective bargaining system.

By contrast, an individual's statutory rights are not the product of the collective bargaining process, and are not the substitute for the individual contract of employment. Rather, they are rights granted the individual by Congress in order to effectuate some public policy; in this respect

they are no different from other statutory rights unrelated to employment.

Of course, Congress has power to allow these statutory rights to be modified or eliminated by private agreement. The Fair Labor Standards Act itself provides a pertinent example of its exercise of that power. Sections 7(b)(1) & (2)[11] permit the performance of work in excess of the maximum hours prescribed in § 7(a) without the payment of overtime compensation if the employee is so employed "in pursuance of an agreement, made as a result of collective bargaining by representatives of employees certified as bona fide by the National Labor Relations Board" (subject to certain limitations not pertinent here). In other instances, rights which have their origin in collective bargaining are given special legislative protection, as § 703(h) of the Civil Rights Act of 1964 illustrates.[12]

Moreover, a recent decision of this Court considering § 703(h) recognizes the broader point that in enacting employee legislation Congress does not act in a vacuum, but does so in the context of a national labor policy which encourages free collective bargaining. In *California Brewers Assn.* v. *Bryant*, 444 U.S. 598, 608, the Court said:

"* * * Congress passed the Civil Rights Act of 1964

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[11] 29 U.S.C. §§ 207(b)(1) & (2), added by §§ 6(a) & (b) of the Fair Labor Standards Amendments of 1961, Pub. Law 87-30, 75 Stat. 69.

[12] Indeed, Congress may determine to permit by agreement or other voluntary action certain conduct which would otherwise be unlawful. The issue which divided the Court in the celebrated case of *Steelworkers* v. *Weber*, 443 U.S. 193 was whether Congress had done so with respect to certain "private, voluntary, race-conscious affirmative plans." (*Id.* at 208.)

> against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers* v. *Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co.* v. *NLRB*, 397 U.S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. See *Ford Motor Co.* v. *Huffman*, 345 U.S. 330; *Aeconautical Lodge* v. *Campbell*, 337 U.S. 521.[13]

Thus, the extent to which statutory rights are subject to waiver, or are to be construed in the light of collective bargaining practice is, like every other question of statutory interpretation, one of determining the legislative intent. And

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[13] In *Aeronautical Lodge* v. *Campbell*, which protected veterans' seniority rights, the Court had held:

> In providing that a veteran shall be restored to the position he had before he entered the military service "without loss of seniority," § 8 of the Act uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must therefore look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran.
>
> Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. All these variations [in the use of the seniority principle] disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. [337 U.S. at 526.]

because the national labor policy is multifaceted, the decision often requires "consideration [of] the total corpus of pertinent law policies that inspired ostensibly inconsistent provisions" (*Boys Markets* v. *Clerks Union*, 398 U.S. 235, 250) instead of reading the statute which creates the right in isolation. But for present purposes the principal point is that the source of statutory rights is a decision by Congress as matter of public policy rather than the exercise of economic strength, which is the source of rights under collective bargaining agreements. Thus, unless Congress has chosen to allow it, these public rights are not to be subordinated to private agreements. And it necessarily follows that statutory rights are to be vindicated according to the methods prescribed by Congress, and not according to the methods prescribed by private parties.

2. The second, and, we believe, major reason why the vindication of statutory rights should not be subject to contractual grievance procedures is that that is not the function which those procedures are designed to perform. Rather, their purpose is to resolve disputes concerning rights which are *created* by the collective bargaining agreement. Section 203(d) endorses the method chosen by the parties "for settlement of grievance disputes arising *over the application or interpretation of an existing collective-bargaining agreement.*" (Emphasis added.) See also § 8(d) quoted at p. 16 n.10, *supra*. And as stated in *Warrior & Gulf*, *supra*: "* * * arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself" (363 U.S. at 578).

As Justice Harlan observed in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, 656, the willingness of management to accept a provision by which it relinquishes absolute con-

trol over a particular term of employment may well depend on the exclusivity of the contractually established procedures for the resolution of disputes concerning that provision. And, the Court has frequently observed, using the *quid pro quo* rubric, unions are willing to give up the right to strike during the life of an agreement only on the condition that disputes during the life of the agreement are to be settled by arbitration.[14] These objectives are, however, quite irrelevant to the vindication of statutory rights.

Moreover, the reasons why parties to collective agreements so frequently prefer to commit their interpretation to a private system rather than to the courts do not explain or justify subjecting the enforcement of statutory rights to arbitration. We need not recapitulate those reasons, which have been spelled out in several opinions of this Court. The most obvious, however, which is the arbitrator's "expertise",[15] is plainly inapplicable to the interpretation of statutes, which is a basic function of the judiciary.

On the contrary, as this Court observed in *Alexander* v.

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[14] The agreement in the present case requires the parties to exhaust the grievance procedure prior to a strike or lockout, but reserves to them the right to engage in economic action in the event of an ultimate deadlock, or the other party's failure to comply with an award of the Joint Grievance Committee. (Joint App., pp. 24-26.)

[15] Such expertise is particularly great where the agreement provides for a permanent umpire, or where, as in the instant case, the decision-making tribunal consists of union and management officials with direct experience under the agreement, and often in its negotiation. But it bespeaks no disrespect (and reflects the experience which resulted in the enactment of the Norris-LaGuardia Act) to say that even labor arbitrators who lack familiarity with a particular collective agreement tend to approach such agreements with a different understanding than do courts.

Gardner-Denver Co., 415 U.S. 36, 53:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.

The Court went on to quote *Steelworkers* v. *Enterprise Mfg. Co.*, *supra*, and to hold, in reliance thereon, that:

> If an arbitral decision is based "solely upon the arbitrator's view of the requirements of enacted legislation," rather than on an interpretation of the collective-bargaining agreement, the arbitrator has "exceeded the scope of the submission ," and the award will not be enforced. [415 U.S. at 53]

While *Alexander* was decided in the context of Title VII, this reasoning seems to us to merit application to public laws generally.[16]

The parties may, of course, authorize the arbitrator to pass on employees' statutory claims. The employer may hope thereby to channel the entire dispute into the private

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[16] In some instances, the scope of the statutory right depends on the claimant's contractual rights and may therefore justify a different result. For example, this was the dissenting Justices' understanding of the situation in *U.S. Bulk Carriers, Inc.* v. *Arguelles*, 400 U.S. 351, 367-378. The majority and concurring opinions in *Arguelles* do not address this problem. Nor do we do so here, because it appears to us that the ultimate merits of the dispute in this case concerning the right of the petitioners to be compensated for the work at issue here is governed by the Fair Labor Standards Act rather than by the collective agreement. Cf. *Steiner* v. *Mitchell*, 350 U.S. 247.

machinery and the union may hope to provide the employees with an additional means for vindicating their rights. But these hopes do not provide a basis for *requiring* the employee to use the grievance procedure.

Alexander went on to hold that where an arbitration award has already been rendered, the trial court "should consider the employee's [Title VII] claim *de novo*," but that the "arbitral decision may be admitted as evidence and accorded such weight as the Court deems appropriate" (*id.* at 60). In this respect as well, we think that the Court's underlying reasoning is applicable to statutory rights generally, unless there is some indication of a contrary Congressional intent, or a special relationship between the statutory right at issue and collective bargaining. The Court "adopt[ed] no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case." (*Id.*, n. 21)

Since in this case there has been arbitration, we anticipate that the respondent may urge that this Court adopt standards which would result in deferral to the Joint Grievance Committee's award herein. We therefore comment briefly on this aspect of the problem. We submit that the correct test is that proposed by the American Law Institute's Tentative Draft No. 4 of the Restatement of Judgments:

> § 132. Arbitration Award
>
> (1) Except as stated in subsections (2), (3), and (4), a valid and final award by arbitration has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court.

> (2) An award by arbitration with respect to a claim does not preclude relitigation of the same or a related claim based on the same transaction if a scheme of remedies permits assertion of the second claim notwithstanding the award regarding the first claim.
>
> (3) A determination of an issue in arbitration does not preclude relitigation of that issue if:
>
> (a) According preclusive effect to determination of the issue would be incompatible with a legislative policy or contractual provision that the tribunal in which the issue subsequently arises be free to make an independent determination of the issue in question, or with a purpose of the arbitration agreement that the arbitration be specially expeditious; or
>
> (b) The procedure leading to the award lacked the elements of adjudicatory procedure prescribed in § 131(2).
>
> 4. When the terms of reference of an arbitration limit the binding effect of the award in another adjudication or arbitration proceeding, the extent to which the award has conclusive effect is determined in accordance with that limitation.

In this instance, adoption of that standard would under ¶¶ 3 and 4 result in denying effect to the Joint Grievance Committee's award: first, because as we have just shown the *Alexander* doctrine applies here; and second, because it does not affirmatively appear that the Committee considered the petitioners' claims under the FLSA but only their claims under the contract. While, as *Enterprise* holds, arbitrators need not write opinions, a Court which is being asked to give effect either to the factual or the legal determinations of a private tribunal on an individual's *statutory*

rights must be able to assure itself of the adequacy of that tribunal's disposition of both the factual and legal issues. There is nothing in the national labor policy which would, for example, require a United States Court of Appeals in passing on an individual's statutory claim, to require less meticulous findings in or to give greater deference to, the award of an arbitrator than the decision of a United States District Court. If the parties to an agreement wish to have arbitrators pass on statutory in addition to contractual claims, and also wish to have such decisions accorded some degree of finality, or at least respect, by the courts, we think that the surrender of some of the informality of the arbitration proceedings is a cross which they must bear, where Congress has decided "to provide a judicial forum for the ultimate resolution of [statutory] employment claims." See *Alexander,* 415 U.S. at 60, n. 21.

III. The Principles Governing the Arbitration of NLRB Rights

Thus far, we have discussed the rights of individuals under statutes other than the NLRA. Different principles are applicable to the relationship between rights under that statute and arbitration awards because it is the primary purpose of the NLRA to further the collective bargaining process. It is this fundamental difference which distinguishes cases like *Alexander, supra,* and this case from *Carey* v. *Westinghouse,* 375 U.S. 261, which approved the decisions of the NLRB beginning with *Spielberg Mfg. Co.,* 112 NLRB 1080, in which the Board deferred to arbitration awards instead of independently determining whether an employee's rights under the NLRA had been violated (*id.* at 270-271). The NLRB explained the *Spielberg* principle in

International Harvester, Co., 138 NLRB 923, 925-926, which was quoted with approval in *Carey*, 375 U.S. at 270-271:

> "There is no question that the Board is not precluded from adjudicating unfair labor practice charges even though they might have been the subject of an arbitration proceeding and award. Section 10(a) of the Act expressly makes this plain, and the courts have uniformly so held. However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act.
>
> "The Act, as has repeatedly been stated, is primarily designed to promote industrial peace and stability by encouraging the practice and procedure of collective bargaining. Experience has demonstrated that collective-bargaining agreements that provide for final and binding arbitration of grievance and disputes arising thereunder, ('as a substitute for industrial strife,') contribute significantly to the attainment of this statutory objective." [17]

This reasoning is sound on the same ground that this Court has sustained the waiver by agreement of certain NLRA rights. The most notable example is *Labor Board* v. *Sands Mfg. Co.*, 306 U.S. 332, which permits the discharge of employees who strike during the term of an agreement in violation of a no-strike commitment. *Sands* gave effect to that contractual undertaking notwithstanding §§ 7 & 8(a)(1) which respectively protect the right to strike and prohibit employer interference with that right, including,

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[17] See also 375 U.S. at 270, n. 7 quoting with approval from *Raley's Inc.* 143 NLRB 256, 258-259 where the Board deferred to an arbitrator's determination of a question of representation.

of course, discharge. As the Court explained in *Mastro Plastics v. Labor Board,* 350 U.S. 270, 280 (emphasis in original):

> On the premise of fair representation, collective-bargaining contracts frequently have included certain waivers of the employees' rights to strike and of the employers' right to lockout to enforce their respective economic demands during the term of those contracts. *Provided the selection of the bargaining representative remains free,* such waivers contribute to the normal flow of commerce and to the maintenance of regular production schedules. Individuals violating such clauses appropriately lose their status as employees.

Mastro Plastics provides two further insights on the relationship between the legality of contractual waivers of NLRA rights and the overall objectives of the Act. First, the Court rejected the employer's contention "that the employees' right to strike against unfair labor practices has been waived by language such as that [in issue]"—*viz.,* by a general no-strike clause sufficient to waive the right to engage in economic strikes (*id.* at 283). Second, the *Mastro* Court expressly left open the question whether the right to engage in unfair labor practice strikes may even be lawfully waived by contract (*id.* at 283).[18]

This case does not require us to draw the line between waivable and non-waivable NLRA rights. For our present point is simply to demonstrate the converse of the proposition developed in Point II above—*viz.,* that where a "statute creates substantive employment rights that are not waivable an arbitration award adverse to the claimant is

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[18] *NLRB* v. *Magnavox,* 415 U.S. 322 invalidates the waiver of § 7 rights concerning employee in-plant distribution of literature.

not entitled to binding effect (even if contrary to the situation here the arbitration purports to determine a statutory claim). Such statutes create employee rights that are ends in themselves and must be treated as such.

On the other hand, even as the waiver of some NLRA rights is consistent with the basic purpose of that statute, it is appropriate for the Board to give effect to arbitration awards that are part and parcel of the collective bargaining process the NLRA and LMRA were enacted to foster. The employee rights stated in those Acts are for the most part not ends in themselves but means to an end—a system of industrial self-government established and carried out by the parties.[19]

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[19] We note that over the years there has been continuing controversy within the Board itself and in the Courts of Appeals as to whether the Board has struck the proper balance in determining whether to defer to particular arbitration awards, or has gone too far or not far enough. That dispute is, of course, quite remote from this case and we therefore do not address it.

We do feel obliged however to comment on the so-called *Collyer* doctrine in light of this Court's remarks on that doctrine, which were not necessary to the decision, in *William E. Arnold Co.* v. *Carpenters,* 417 U.S. 12, 18-19. In the *Collyer* case the Board held that the parties must exhaust contractual grievance procedures before the Board will entertain a *statutory* complaint *which could have been* resolved under the private system. See 192 NLRB 837. Compare *General American Transportation Corp.,* 228 NLRB 808, and *Roy Robinson Chevrolet,* 228 NLRB 828, which limit and restate the scope of *Collyer.*

In our view *Collyer* is not a logical extension of the *Spielberg* doctrine and is indeed harmful to both the arbitration and collective bargaining systems. *Collyer* harms the arbitration system because it requires the parties to decide by arbitration disputes which they have not chosen to submit thereto and in the long run puts them to the choice of abandoning or limiting their grievance pro-

CONCLUSION

For the above stated reasons the judgment below should be reversed.

Respectfully submitted,

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cedures or forfeiting access to the NLRB. *Collyer* harms the collective bargaining system by reading into arbitration clauses a promise never made—to refrain from filing statutory, as opposed to purely contractual, claims with the Board. That is inconsistent with the limits placed on the Board by § 8(d). See *NLRB* v. *Burns Security Services,* 406 U.S. 272, 287 and pp. 15-16, n.9 *supra.* This is especially plain in light of the general rule that where a claim may be based on more than one legal source, the choice is with the *claimant.* See *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (Holmes, J.).

Of course we do not ask the Court to disapprove *Collyer.* But we do urge that while both *Alexander* in its proper sphere and *Carey* (and its approval of *Spielberg*) in its area of application are sound and should be reapproved, no additional sustenance should be given *Collyer.*